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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BUTTE ENVIRONMENTAL COUNCIL,)	
)	
Plaintiff,)	2:08-cv-1316-GEB-CMK
)	
v.)	<u>ORDER</u>
)	
UNITED STATES ARMY CORPS OF)	
ENGINEERS; UNITED STATES FISH)	
AND WILDLIFE SERVICE; and City of)	
REDDING,)	
)	
Defendants.)	
_____)	

Pending are cross-motions for summary judgment. Plaintiff Butte Environmental Council ("BEC") seeks summary judgment on its claim that the United States Army Corps of Engineers ("the Corps") violated the Clean Water Act ("CWA") when it issued a Section 404 permit authorizing the Stillwater Business Park development project ("the Project"); and on its claim that the Corps' Environmental Assessment ("EA"), which found the Project would not have a significant impact under the National Environmental Policy Act ("NEPA"), violates NEPA because it contains an inadequate cumulative impacts analysis and the public did not have adequate opportunity to comment on the EA. BEC also seeks summary judgment on it claims that

1 the United States Fish and Wildlife Service ("FWS") violated the
2 Endangered Species Act ("ESA") by issuing an inadequate Biological
3 Opinion ("BiOp") for the Project, and on its claim that the Corps
4 violated that Act when issuing a Section 404 permit authorizing the
5 Project based on the BiOp. Defendants seek summary judgment on all of
6 BEC's claims.

7 Background

8 The Project is located in Shasta County, California, and
9 will impact waters of the United States. The City of Redding ("the
10 City") is developing the Project in the Stillwater Plains area
11 southeast of downtown Redding, California ("Stillwater site"). The
12 Project's stated purpose is to enhance the City's economic stability
13 by attracting business and industry, thereby improving the quality of
14 life of unemployed and low-paid residents. The Project will directly
15 and indirectly affect critical habitats for the vernal pool fairy
16 shrimp, vernal pool tadpole shrimp, and slender Orcutt grass. Vernal
17 pool tadpole shrimp are listed as endangered under the ESA, while
18 vernal pool fairy shrimp and slender Orcutt grass are listed as
19 threatened under the ESA.

20 In 2003, the City began drafting a joint Environmental
21 Impact Statement and Environmental Impact Report ("EIS/EIR"). Draft
22 EIS/EIRs were submitted to the Corps and the Environmental Protection
23 Agency ("EPA") for comment. On April 18, 2006, the City approved a
24 Final EIS/EIR for the Project. Thereafter, the City applied to the
25 Corps for a permit under Section 404(b) of the CWA, as required by
26 that Act, since the Project involves discharge of fill material into
27 waters of the United States. The Corps has the authority under the
28 CWA to issue the permit provided the proposed project does not violate

1 the ESA. See 16 U.S.C. § 1536(a)(2). On December 18, 2006, the Corps
2 issued a public notice that it would be evaluating the City's permit
3 application for the Project.

4 The Corps entered into formal consultation with the FWS
5 under Section 7(a)(2) of the ESA to evaluate whether the project would
6 be "likely to jeopardize the continued existence of any endangered
7 species or threatened species or result in the destruction or adverse
8 modification of habitat of such species which is determined . . . to
9 be critical . . ." 16 U.S.C. § 1536(a)(2).¹ If the FWS determines
10 under Section 7 the project is not likely to jeopardize the continued
11 existence of the species or its critical habitat but may result in the
12 incidental "take" of threatened or endangered species, it issues an
13 "Incidental Take Statement" along with a BiOp. See 16 U.S.C. §
14 1536(b)(4); 50 C.F.R. § 502.14(g)(4).² The Incidental Take Statement
15 must specify "the impact of such incidental taking on the species" and
16 "reasonable and prudent measures [considered] necessary or appropriate
17 to minimize such impact . . ." 16 U.S.C. § 1536(b)(4).

19 ¹The term 'critical habitat' for a threatened or endangered species
20 means the specific areas . . . occupied by the species . . . found [to
21 have] physical or biological features [] essential to the conservation
22 of the species and [] which may require special management
23 considerations or protection . . ." 16 U.S.C. § 1532(5)(A).
24 "Jeopardize the continued existence of" means "to engage in an action
25 that reasonably would be expected, directly or indirectly, to reduce
26 appreciably the likelihood of both the survival and recovery of a listed
27 species . . . by reducing the reproduction, numbers, or distribution of
28 that species." 50 C.F.R. § 402.02.

²The BiOp must include a "summary of the information on which the
opinion is based"; "a detailed discussion of the effects of the
[project] on listed species or critical habitat"; and "[FWS's] opinion
on whether the action is [or is not] likely to jeopardize the continued
existence of a listed species or result in the destruction or adverse
modification of critical habitat." 50 C.F.R. § 502.14(h)(1)-(3). See
also NRDC v. Rodgers, 381 F. Supp. 2d 1212, 1224 (E.D. Cal. 2005).

1 On December 27, 2006, the FWS issued a BiOp and Incidental
2 Take Statement for the Project, in which it concluded the Project
3 would not jeopardize the continued existence of, or adversely modify
4 or destroy the critical habitat for the vernal pool fairy shrimp,
5 vernal pool tadpole shrimp, and/or slender Orcutt grass. The FWS
6 imposed several mitigation conditions upon the Incidental Take
7 Statement to ensure that the City would to compensate for the critical
8 habitat loss. The Corps relied on the FWS's BiOp in determining that
9 the proposed Project complied with the ESA.

10 On August 9, 2007, the Corps issued an EA and Finding of No
11 Significant Impact ("FONSI") under NEPA, which was included in the
12 "Department of the Army Permit and Evaluation and Decision Document"
13 ("Decision Document").³ On August 21, 2007, the Corps granted a
14

15 ³NEPA "is our basic national charter for protection of the
16 environment." 40 C.F.R. § 1500.1(a). It is a procedural statute that
17 requires the Federal agencies to assess the environmental consequences
18 of their actions before those actions are undertaken. For "major federal
19 actions significantly affecting the quality of the human environment,"
20 42 U.S.C. § 4332(2)(C), the agency is required to prepare an
21 environmental impact statement ("EIS"). An EIS is a thorough analysis of
22 the potential environmental impacts that "provide[s] full and fair
23 discussion of significant environmental impacts and . . . inform[s]
24 decisionmakers and the public of the reasonable alternatives which would
25 avoid or minimize adverse impacts or enhance the quality of the human
26 environment." 40 C.F.R. § 1502.1.

27 Where an agency is unsure whether an action is likely to have
28 "significant" environmental effects, it may prepare an EA: a "concise
public document" designed to "briefly provide sufficient evidence and
analysis for determining whether to prepare an environmental impact
statement" 40 C.F.R. § 1508.9. If the EA concludes that the
action will not have a significant effect on the environment, the agency
may issue a Finding of No Significant Impact and may then proceed with
the action. 40 C.F.R. § 1508.13. That is the route taken by the [Corps]
for the [Project] at issue here. . . Klamath-Siskiyou Wildlands Ctr. v.
BLM, 387 F.3d 989, 993 (9th Cir. 2004) (internal citations omitted).

1 permit to the City under Section 404 which was also based on the
2 Decision Document.

3 Standard of Review

4 "Judicial review of administrative decisions under the [CWA,
5 ESA, and NEPA] is governed by the [Administrative Procedure Act
6 ("APA")]. Under the APA, a court may set aside an agency action if
7 the court determines that the action was 'arbitrary, capricious, an
8 abuse of discretion, or otherwise not in accordance with the law.'" W. Watersheds Project v. Matejko, 468 F.3d 1099, 1107 (9th Cir.
9 2006) (internal citations omitted). "In making this inquiry, [the
10 court] ask[s] whether the agency considered the relevant factors and
11 articulated a rational connection between the facts found and the
12 choice made." Natural Resources Defense Council v. United States DOI,
13 113 F.3d 1121, 1124 (9th Cir. 1997) (internal citations and quotations
14 omitted).
15

16 "Review under the arbitrary and capricious standard is
17 deferential" to the agency. National Ass'n of Homebuilders v.
18 Defenders of Wildlife, 127 S.Ct. 2518, 2529 (2007). A reviewing court
19 should not vacate an agency's decision unless the agency: "has relied
20 on factors which Congress has not intended it to consider, entirely
21 failed to consider an important aspect of the problem, offered an
22 explanation for its decision that runs counter to the evidence before
23 the agency, or is so implausible that it could not be ascribed to a
24 difference in view or the product of agency expertise." Id. at 2529-
25 2530 (internal citation omitted).

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1 Analysis

2 Clean Water Act Claim

3 BEC argues it is entitled to summary judgment on its CWA
4 claim since the Corps failed to adequately consider practicable
5 alternatives to the Stillwater site before it issued the Section 404
6 permit. (Pl. Mot. at 14:14-19.) When evaluating a Section 404 permit
7 application, the Corps must consider "the practicability of using
8 reasonable alternative locations and methods to accomplish the
9 objective of the proposal." 33 C.F.R. § 320.4(a)(2)(i).

10 40 C.F.R. § 230.10(a) provides that no discharge
11 of dredged or fill material shall be permitted if
12 there is a practicable alternative to the proposed
13 discharge which would have less adverse impact on
14 the aquatic ecosystem, so long as the alternative
15 does not have other significant adverse
16 environmental consequences. A practicable
17 alternative is one that is available and capable
18 of being done after taking into consideration
19 cost, existing technology, and logistics in light
20 of overall project purposes. In evaluating
21 whether a given alternative site is practicable,
22 the Corps may legitimately consider such facts as
23 cost to the applicant and logistics. In addition,
24 the Corps has a duty to consider the applicant's
25 purpose. Where a proposed project does not
26 require access to water, i.e., it is not "water
27 dependent," the availability of practicable
28 alternatives is presumed." 40 C.F.R. §
230.10(a)(3).

21 Bering Strait Citizens for Responsible Res. Dev. v. United States Army
22 Corps of Eng'rs, 524 F.3d 938, 947 (9th Cir. 2008) (internal quotations
23 and citations omitted).

24 The Project is not water dependent. The Decision Document
25 states, "The basic purpose [of the Project] is economic development
26 which is not water dependent." (Administrative Record ("AR") 545);
27 Pl. Mot. at 13:15-16; Ds. Mot. at 13:15-16.) Therefore, it is
28 presumed practicable alternatives to the Stillwater site exist. BEC

1 contends the Corps has not overcome this presumption, arguing the
2 Corps did not adequately address concerns raised by the Corps itself
3 and the EPA before selecting the Stillwater site as the "least
4 environmentally damaging practicable alternative" ("LEDPA"). (Id. at
5 19-20:26-5.)

6 BEC cites to letters in the Administrative Record sent by
7 the EPA and the Corps, in which the EPA and the Corps raise concerns
8 about the Stillwater site as the LEDPA. (AR 1413, 911, 1414, 3112,
9 2205, 1426, 3115.) On April 29, 2005, the Corps sent a letter to the
10 City commenting on the City's Draft EIS/EIR. (AR 3154-3155.) The
11 letter stated:

12 [Y]our preferred alternative [the Stillwater site]
13 does not appear to be the LEDPA, as there may be
14 less environmentally damaging alternatives for
15 this project. The range of alternatives
16 considered practicable in your Draft [EIS/EIR]
17 does not include alternatives that avoid impacts
18 to waters of the U.S., including wetlands,
19 (waters) to the maximum extent possible. . . The
20 screening criteria used for selecting practicable
21 alternatives is still too restrictive to determine
22 LEDPA and eliminates reasonable alternatives such
23 as alternative 4. (Id.)

24 On June 23, 2005, the EPA also sent a letter to the City commenting on
25 the Draft EIS/EIR:

26 We recognize the efforts the City has made with
27 refinements to their preferred [a]lternative[,]
28 [the Stillwater site,] to minimize impacts to on-
site aquatic resources. However, as we have
discussed in writing and at our meetings,
secondary and cumulative off-site impacts from the
project remain of significant concern to us when
considering this alternative. (AR 3112.)

29 The Corps counters it adequately considered practicable
30 alternatives to the Stillwater site and addressed its own comments and
31 those from the EPA regarding the Stillwater site. (Ds. Mot. at 13:7-
32 13.) The Corps argues it "balanced the need to look at a reasonable

1 range of alternatives along with the applicant's [purpose]." (Ds.
2 Mot. at 14:2-3.) "In evaluating whether a given alternative site is
3 practicable, the Corps may legitimately consider such facts as cost to
4 the applicant and logistics. In addition, the Corps has a duty to
5 consider the applicant's purpose." Sylvester v. U.S. Army Corps of
6 Engineers, 882 F.2d 407, 409 (9th Cir. 1989). The Corps argues that
7 in considering the Project's purpose, the Stillwater site emerged as
8 the LEDPA.

9 Further, the Corps cites to the Administrative Record as
10 demonstrative that it's own independent evaluation of the Project's
11 purpose led to modification of the City's original proposed purpose.
12 In 2003, the City stated, in a draft statement of the "Basic and
13 Overall Project Purposes," "The City of Redding has a need to develop
14 a business park that is capable of accommodating diverse
15 manufacturing, wholesale, food processing, information processing,
16 product distribution, and air cargo users." (AR 3649.) However, the
17 Corps stated in its Decision Document that the Project's purpose is
18 "to construct a medium to large sized regional business park with
19 associated roads, utilities and infrastructure within the City of
20 Redding's sphere of influence." (AR 545.) The Administrative Record
21 reflects this modification was a result of extensive communication
22 between the Corps, the EPA, and the City. (AR 3647-3656; 3491-3510;
23 3522-3524.

24 The Corps argues it carefully evaluated and eliminated the
25 City's twelve proposed alternatives and a site it independently
26 selected. (Ds. Mot. at 14:10-18.) During its consideration of the
27 Project, the Corps evaluated a site that was not included in the
28 City's permit application, the Mitchell site. (Id. 13:12-13.) The

1 Decision Document explains, "the City could not justify the [12
2 million dollar] cost of the Mitchell Project" in 2006. (AR 546.)
3 Further, "[t]he amount of property available [at the Mitchell site
4 was] too small to achieve the overall project purpose." (Id.) This
5 finding is substantiated by evidence in the Administrative Record;
6 specifically on March 26, 2007, Nancy Haley ("Haley"), the Corps'
7 Project Manager, sent an email explaining, "We are going to throw
8 Mitchell out on cost and likely the fact that the park would be
9 disjoined, therefore not feasible practically." (AR 2005.)

10 The Administrative Record further shows several of the
11 City's proposed sites were eliminated because they failed to meet the
12 requisite criteria. As the Decision Document explains:

13 Six parcels were eliminated [] because they
14 failed to meet one or more of 3 criteria. The
15 sites initially needed to be within the City of
16 Redding or within the Sphere of Influence; have
17 the ability to be competitive with other cities
and counties to attract diverse businesses and
accommodate users; and have the ability to
accommodate numerous businesses without displacing
existing businesses and residences. (AR 546.)

18 The Draft EIS/EIR prepared by the City in February 2005 explains how
19 each of these sites did not meet one of the initial screening
20 criteria. (AR 675-680.) The Decision Document further explains that
21 five alternatives were eliminated for one of the following reasons:
22 (1) the site was not available for acquisition; (2) the site may have
23 resulted in adverse social or economic impacts on existing
24 development;⁴ (3) the site could not accommodate potential multiple

25
26 ⁴The February 15, 2005 Draft EIS/EIR provides the following example
27 of an adverse social or economic effect on existing development: "The
28 placement of a distribution center which operate[s] 24-hours per day
adjacent to an existing single family residential development could
result in potentially significant ambient noise increases, stationary
(continued...)

1 lot sizes; (4) the site was not capable of being served by the cities'
2 utilities; and/or (5) the site likely entailed unreasonable
3 development costs, meaning the costs exceeded the market value of the
4 developed property. (AR 547; 681-689.) The remaining alternative was
5 eliminated because it posed greater risks to wetland areas and
6 threatened or endangered species. (AR 547.)

7 Additionally, the Corps cites to evidence in the
8 Administrative Record controverting BEC's argument that the Corps did
9 not adequately consider its own concerns, as well as those raised by
10 the EPA. The Corps argues that not only did it modify the project's
11 purpose, thereby eliminating its own concerns that the City's proposed
12 purpose was too restrictive, it also eliminated "alternative 4" for
13 valid reasons, thereby addressing concerns raised in its April 29,
14 2005 letter. (AR 3154-3155.) In the City's Final EIS/EIR, dated
15 February 8, 2006, it explained alternative 4 was eliminated because
16 "[the] site is not practicable." The City's "Preliminary 404(b)(1)
17 Alternatives Analysis," prepared in November 2006, further explains
18 that because 8,300 feet of a tributary to Stillwater Creek ran through
19 the center of the alternative 4 site, that tributary would need to be
20 filled in order to accommodate a contiguous 100 acre site. (AR 2689-
21 2690.)

22 Further, the Corps cites to the Administrative Record as
23 demonstrative that the EPA's and it's own concerns were addressed,
24 specifically by comparing how the original plan was modified in
25

26 ⁴(...continued)
27 exhaust emissions while truck[s] are 'warming-up' and idling, glare from
28 parking lot lights, potential conflicts with automobile traffic, and
potential aesthetic impacts. These impacts could affect property
values, and general health and safety." (AR 681.)

1 response to these concerns. In a Supplemental Draft EIS/EIR, issued
2 on September 16, 2005, the City details revisions made to the February
3 2005 Draft EIS/EIR which address the comments made by the EPA and the
4 Corps in April and June 2005. (AR 1327; 3154-3112.) These onsite
5 revisions included:

6 [R]econfiguring areas and illustrative lots where
7 development is permitted [] to site hydrology,
8 hydrological connectivity, sensitive listed
9 species, habitat quality and other biological
10 related resources; eliminating road connections to
11 the east; reducing the lengths of trails through
12 wetland complexes; moving the 115kV electrical
13 transmission line along the main road or into
14 areas of less sensitivity; using stormwater BMP's
15 to minimize impacts to receiving waters from the
16 Project area; preventing development site run-off
17 from entering the existing horseshoe pond; and,
18 creating an easement or other land use restriction
19 along the northern and eastern boundaries to
20 prevent any infrastructure or development
21 connectivity to the north and east. (AR 1314.)

22 Additionally, the Corps' cites to direct impact tables showing that
23 consultations between the Corps and the City led to a reduction of
24 direct impacts by 0.83 acres between February and March of 2007. (AR
25 2013-2041, 2042-2070, 2012, 2172.)

26 "[T]he record reflects [] the Corps made the proper
27 analysis and weighed the correct factors in making its determination
28 that no feasible alternatives [to the Stillwater site] existed. The
29 Corps did not err by taking [] costs into account. The regulations
30 explicitly charge the Corps with taking cost, existing technology and
31 logistics in light of overall project purposes. 40 C.F.R. §
32 230.10(a)(2)." Friends of Earth v. Hintz, 800 F.2d 822, 833 (9th Cir.
33 1986) (upholding the District Court's determination that the Corps'
34 practicable alternatives analysis was proper; and further, affirming
35 the Corps' decision to eliminate four proposed site alternatives).

1 Therefore, the Corps was neither arbitrary nor capricious when
2 "rationally conclud[ing]" the Stillwater site was the LEDPA. Id. at
3 834. Accordingly, this portion of Defendants' cross-motion is
4 granted.

5 Endangered Species Act Claim

6 BEC seeks summary judgment of its ESA claim, arguing FWS's
7 determination in the BiOp that there would not be adverse modification
8 to critical habitat was arbitrary and capricious. (Pl. Mot. at 28:4-
9 9.)⁵ "[The court's] review [of a BiOp] is 'narrow' but 'searching and
10 careful,' and [] must ensure that the FWS's decisions are based on a
11 consideration of relevant factors and [] assess whether there has
12 been a clear error of judgment. The FWS must state a rational
13 connection between the facts found and the decision made." Gifford
14 Pinchot Task Force v. United States Fish & Wildlife Serv., 378 F.3d
15 1059, 1065 (9th Cir. 2004) (internal citations omitted).

16 FWS's BiOp concluded "that the proposed [P]roject would not
17 result in the adverse modification or destruction of critical habitat
18 for vernal pool fairy shrimp, vernal pool tadpole shrimp, or slender
19 Orcutt grass." (BiOp at 29.) BEC challenges this finding, citing to
20 language in the BiOp's conclusion indicating that the Project would
21 result in adverse modification to the respective critical habitats:

22 However, the proposed project would contribute to
23 a local and range-wide trend of habitat loss and
24 degradation, the principal reasons that the valley
25 elderberry longhorn beetle, vernal pool fairy
26 shrimp, vernal pool tadpole shrimp, and slender
27 Orcutt grass were federally-listed. The proposed
28 project will contribute to the fragmentation and

27 ⁵At oral argument on December 15, 2008, Plaintiff stated it was only
28 challenging the "adverse modification" finding of the BiOp and not the
"no jeopardy" finding; accordingly, only FWS's "adverse modification"
finding is addressed.

1 reduction of the acreage of the remaining listed
2 vernal pool species habitat located in critical
3 habitat, the Redding Core Recovery Area, and
throughout the range of these federally-listed
species.

4 The proposed project would also directly and
5 indirectly affect hundreds of acres of upland
6 habitat that supports the aquatic habitat that is
required for the survival of the three vernal pool
species addressed in this biological opinion.

7 (BiOp at 30.) BEC argues this concluding language bears no rational
8 connection to the BiOp's ultimate conclusion. (Pl. Mot. at 26-27.)

9 BEC further cites to the BiOp's findings on the Project's
10 impacts on critical habitat. (Pl. Mot. at 26.) The BiOp found the
11 Project would result in the destruction of 234.5 acres, 5.4%, of
12 vernal pool crustaceans in units 1 and 5 of protected vernal pool
13 crustacean critical habitat. (BiOp at 27.) Further, the BiOp found
14 the Project would result in the destruction of 242.2 acres, 3.7%, of
15 unit 2 of protected slender Orcutt grass critical habitat. (BiOp at
16 28.) Additionally, the Project would destroy 356.6 acres of vernal
17 pool crustacean critical habitat uplands and 242.2 acres of slender
18 Orcutt grass critical habitat uplands. (Id. at 27-28.)

19 Defendants rejoin the FWS's determination that the Project
20 would not adversely modify critical habitat for the respective species
21 was reasonable and seek summary judgment on BEC's ESA claim. (Ds.
22 Mot. at 27:15-19.) Defendants argue FWS reasonably relied upon
23 mitigation measures to be imposed upon the City when making its no
24 adverse modification determination. (Ds. Mot. at 22:1-2.) The BiOp
25 contains proposed conservation measures for the vernal pool fairy
26 shrimp, vernal pool tadpole shrimp, the slender Orcutt grass, and
27 their critical habitat. (BiOp at 10-12.) Preservation would occur at
28 both on and off site locations and would range in preservation ratios

1 from 1:1 to 4:1 (Id.) The Incidental Take Statement's "Terms and
2 Conditions" require the City to adhere to the BiOp's conservation
3 measures and also imposes several conservation measures prior to the
4 Project's start. (BiOp at 32-33.)

5 In Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944,
6 956 (9th Cir. 2003), the Ninth Circuit held:

7 If a Conservation Agreement is in place, then the
8 reviewing agencies ought to consider it when
9 evaluating the impact of the proposed action. It
10 is also relevant to know that the Agreement
11 imposes enforceable obligations on the parties, to
12 assure that the proposed mitigation measures will
actually be implemented. Accordingly, it was
proper for the Forest Service and Fish & Wildlife
to consider the Conservation Agreement when
evaluating the Stimson Project.

13 Therefore, under the ESA, it is reasonable for FWS to take into
14 consideration mitigation measures when making a "no adverse
15 modification" determination. Even though the Administrative Record
16 "makes it clear" that there will be negative impacts on critical
17 habitat, "[t]he same record [] evaluates in some detail the ways in
18 which these impacts will be mitigated by compensation measures. . ."
19 Hayward Area Planning Association, 2004 WL 724950 *7 (N.D. Cal.
20 2004) (holding the "dedication of 1,197 acres for the preservation and
21 management of whipsnake critical habitat for the benefit of the
22 whipsnake and frog" was rationally taken into account by FWS in
23 determining there was no adverse modification of critical habitat in
24 its BiOp). Additionally, the Administrative Record shows the
25 enforceable mitigation is "rationally related to the level of take
26 under the plan" as required under 16 U.S.C. § 1539(a)(2)(B)(ii).
27 Nat'l Wildlife Fed'n v. Norton, 306 F. Supp. 2d 920, 928 (E.D. Cal.
28 2004). The Incidental Take Statement issued by the FWS in this case

1 "imposes enforceable obligations on the parties, to assure that the
2 proposed mitigation measures will actually be implemented." Selkirk,
3 336 F.3d at 956.

4 Defendants further argue that the FWS reasonably based its
5 "no adverse modification" determination on the entire critical habitat
6 for the respective species. (Ds. Mot. at 26-27:22-5.) The BiOp, in
7 analyzing the status of the respective species, states there are 35
8 critical habitat units designated for vernal pool fairy shrimp,
9 totaling 597,821 acres; 18 critical habitat units designated for
10 vernal tadpole shrimp, totaling 228,785 acres; and six critical
11 habitat units designated for slender Orcutt grass, totaling 94,213
12 acres. (BiOp at 16, 19.) The ESA Section 7 Consultation Handbook
13 states:

14 Adverse effects on individuals of a species or
15 constituent elements or segments of critical
16 habitat generally do not result in jeopardy or
17 adverse modification determinations unless that
18 loss, when added to the environmental baseline, is
19 likely to result in significant adverse effects
20 throughout the species entire range, or
21 appreciably diminish the capability of critical
22 habitats to satisfy essential requirements of the
23 species.

20 See also Gifford Pinchot Task Force v. United States Fish & Wildlife
21 Serv., 378 F.3d 1059, 1075 (9th Cir. 2004) (stating "The BiOps
22 considered the important local effects, analyzing critical habitat
23 more broadly when individual effects were not important").

24 In light of the enforceable mitigation measures and the
25 permissible broader analysis of critical habitat, the BiOp does state
26 a "rational connection between the facts found and the conclusion
27 reached." Id. at 1065. Accordingly, this portion of Defendants'
28 cross-motion is granted.

1
2 National Environmental Policy Act Claim

3 BEC argues it is entitled to summary judgment on its NEPA
4 claim since the Corps failed to take a "hard look" at the cumulative
5 impacts of the Project on critical habitat of the threatened and
6 endangered species involved in this litigation. (Pl. Mot. at 31:4-
7 10.)

8 Courts apply a "rule of reason" standard in
9 reviewing the adequacy of a NEPA document.
10 Through the NEPA process, federal agencies must
11 "carefully consider[] detailed information
12 concerning significant environmental impacts," but
13 they are "not require[d] to do the impractical."
14 Alternatively phrased, the task is to ensure that
15 the agency has taken a "hard look" at the
16 potential environmental consequences of the
17 proposed action.

18 Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 993 (9th Cir.
19 2004) (internal citations omitted).

20 BEC argues the cumulative impacts analysis contained in the
21 EA was not thorough enough and did not adequately address previous
22 concerns raised by the EPA with respect to the cumulative impacts
23 analysis. (Pl. Mot. at 30-31.) The Decision Document cites to and
24 relies upon the cumulative impacts analysis from the City's EIS/EIRs;
25 and incorporates by reference the February 15, 2005 draft EIS/EIR; the
26 September 16, 2005 supplemental draft EIS/EIR; and the April 2006
27 final EIS/EIR. (AR 557-558; 544.) BEC cites to a November 14, 2005
28 letter from the EPA, in which the EPA raises concerns about a draft
EIS/EIR's cumulative impacts analysis. (AR 1430; Pl. Mot. at 30:8-
12.) The pertinent comments are as follows:

Finally, in our previous discussions with the City
and in our comments on the [Draft EIS/EIR], EPA
expressed the importance of a substantive-
cumulative impacts analysis for the proposed

1 project stemming from past and reasonably
2 foreseeable development projects in Shasta County
3 which will collectively impact important natural
4 communities. Although the supplemental [Draft
5 EIS/EIR] includes additional information on other
6 projects in the area, the document does not
7 justify the determination that there would be no
8 cumulative impacts to groundwater, surface water,
9 habitat or air quality, as a result of these
10 developments. (AR 1430.)

11 BEC argues the Final EIS/EIR did not address the EPA's concerns which
12 were raised in this letter. (Pl. Mot. at 30:15-19.)

13 The Corps counters the City's Final EIS/EIR did address the
14 EPA's concerns about its cumulative impacts analysis. (Ds. Mot. at
15 29:13-15.) Later drafts and supplements to the EIS/EIR included a
16 comprehensive table of projects in the area which would be expected to
17 contribute to the cumulative impacts of the Project. (AR 1473-1474.)
18 Modifications were also made to the site as evidenced by the City's
19 changes to the Project:

20 [The Project site,] as modified, will no longer be
21 hydrologically connected to the Stillwater Plains
22 Mitigation Bank which would preclude hydrologic
23 impacts from occurring. The Proposed Action also
24 includes a measure to ensure that development in
25 the Stillwater Plains ecosystem will not occur as
26 a result of the Project by creating easements that
27 prevent the extension of infrastructure to the
28 north, east, and southeast. . . As identified in
the [supplemental draft EIS/EIR,] the Project will
create buffers that preclude development from
extending northward or eastward into the
Stillwater Plains Conservation Area. (AR 1453-
1454.)

23 Additionally, the Corps cites to the Administrative Record as
24 demonstrative that it independently advised the City on its cumulative
25 impacts analysis, further satisfying the requirement to take a "hard
26 look" at the cumulative impacts of the Project. (Ds. Mot. at 30:15-
27 19.) On September 29, 2005, Jonathan Foster, a Corps' employee, sent
28 an email to the City commenting on the September 16, 2005 supplemental

1 draft EIS/EIR. (AR 1436-1436.) This email provided guidance to the
2 City on how to analyze the Project's potential cumulative impacts.
3 (Id.) In a June 2007 letter, Haley further explained the Corps was
4 considering the cumulative impacts of "reasonably foreseeable"
5 projects. (AR 1768-1769.)

6 The Administrative Record shows the Corps took the requisite
7 hard look at the cumulative impacts before issuance of the EA and
8 FONSI. BEC has not met its burden to show that the Corps' actions
9 with respect to cumulative impacts were "arbitrary and capricious."
10 See Inland Empire Pub. Lands Council v. United States Forest Serv., 88
11 F.3d 754, 764 (9th Cir. 1996) (stating "Plaintiffs have advanced no
12 proof why this decision is arbitrary and capricious, as is their
13 burden"). Therefore, this portion of Defendants' cross-motion is
14 granted.

15 BEC also seeks summary judgment on its NEPA claim contending
16 the Corps failed to provide the public with notice and an opportunity
17 to comment directly on the EA and FONSI prior to the Corps' issuance
18 of these findings. However, as the Ninth Circuit recently held:

19 [T]he circulation of a draft EA is not required in
20 every case. We do not say that it is always
21 required or that it is never required. Instead,
22 we stress that the regulations governing public
23 involvement in the preparation of EAs are general
24 in approach, see 40 C.F.R. § 1506.6, requiring the
25 circulation of a draft EA in every case would
26 apply a level of particularity to the EA process
27 that is foreign to the regulations. Also,
28 requiring the circulation of a draft EA in every
case could require the reversal of permitting
decisions where a draft EA was not circulated even
though the permitting agency actively sought and
achieved public participation through other means.
The regulations do not compel such formality. See
40 C.F.R. § 1508.9. . . .

"The way in which the information is provided is
less important than that a sufficient amount of
environmental information--as much as

1 practicable--be provided so that a member of the
2 public can weigh in on the significant decisions
3 that the agency will make in preparing the EA."
4 Stated another way, we now adopt this rule: An
5 agency, when preparing an EA, must provide the
6 public with sufficient environmental information,
7 considered in the totality of circumstances, to
8 permit members of the public to weigh in with
9 their views and thus inform the agency
10 decision-making process.

11 Bering Strait Citizens for Responsible Res. Dev. v. United States Army
12 Corps of Eng'rs, 524 F.3d 938, 953 (9th Cir. 2008) (citing Sierra Nev.
13 Forest Prot. Campaign v. Weingardt, 376 F. Supp. 2d 984, 991-992 (E.D.
14 Cal. 2005).

15 The Administrative Record shows the public had opportunities
16 throughout 2001-2007, the time period within which the Corps and City
17 were evaluating the Project, to "weigh in with their views." Bering,
18 524 F.3d at 953. The Administrative Record shows public meetings were
19 held on the following dates: April 4 2001; August 12, 2003; June 2,
20 2004; October 26, 2005; October 24, 2005; April 11, 2006; and April
21 18, 2006. (AR 2917.) Further, on December 18, 2006, the Corps
22 solicited public input through a Public Notice "advising all
23 interested parties of the proposed activity" for which the Permit was
24 sought; and further, requesting comments be submitted by January 16,
25 2007. (AR 1646.) The Corps received three letters in response to the
26 Public Notice, including a letter from BEC. (AR 2224-2229.) These
27 letters were addressed in the Decision Document. (AR 562-566.) In a
28 June 7, 2007 letter, sent in response to an inquiry regarding public
meetings, Haley explained:

29 The City of Redding held several public hearing[s]
30 for this project between April 2001 and April 2006
31 . . . In this instance, because so many public
32 hearings were already held for this project and
33 because the level of impacts to waters of the
34 United States, including wetlands, were so minimal

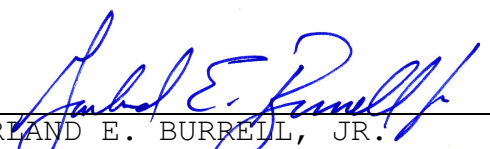
1 in light of the acres of wetlands preserved on the
2 site, the Corps determined no hearing was
necessary. (AR 1769.)

3 Therefore, in the totality of circumstances, the Corps provided
4 sufficient opportunity to the public to comment before issuing the EA
5 and FONSI; and, accordingly, this portion of Defendant's cross motion
6 is granted.

7 Conclusion

8 For the reasons stated, Defendants' cross-motion for summary
9 judgment is granted and BEC's motion is denied. Judgment shall be
10 entered in favor of Defendants.

11 Dated: January 20, 2009

12
13 
14 _____
GARLAND E. BURRELL, JR.
United States District Judge